Filed 11/23/16 Barrette v. Chevron Corp. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CRAIG BARRETTE,

Plaintiff and Appellant,

v.

CHEVRON CORPORATION et al.,

Defendants and Respondents.

F070821

(Super. Ct. No. CV-278737)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Johnson Cebula and R. Scott Johnson for Plaintiff and Appellant.

Call & Jensen, Julie R. Trotter and Jacqueline Beaumont for Defendants and Respondents.

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Plaintiff appeals from the summary judgment entered in favor of defendants in an action alleging wrongful termination, violations of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA),[1] and related causes of action. We conclude plaintiff has failed to demonstrate that a triable issue of material fact remains for trial, and therefore affirm.

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1 All further statutory references are to the Government Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleged in his second amended complaint that he is an Australian citizen. Beginning in June 2008, he was employed by defendant Chevron[2] as a resident expatriate ("expat") employee. He was assigned to work at Chevron's plants in Kern County as a process engineer. In January 2010, a new supervisor, defendant Louis Diamond, was assigned to supervise plaintiff's work. Diamond allegedly harassed and discriminated against plaintiff because of his expat status. Plaintiff complained of the harassment to Diamond's supervisor, defendant Richard Fortnum, but the harassment continued and escalated. Plaintiff's performance reviews, which had been good, began to show he failed to meet expectations. In January 2011, plaintiff was assigned a new supervisor, Lisa Hawker, who later placed him on a Performance Improvement Program (PIP) to document and monitor plaintiff's work. On April 20, 2011, plaintiff went on medical leave after experiencing cardiac symptoms. When he returned from leave on August 9, 2011, his employment was terminated because of uncompleted tasks under his PIP.

The second amended complaint contained causes of action for wrongful termination in violation of public policy, discrimination based on national origin or association in violation of FEHA, harassment based on national origin or association in violation of FEHA, discrimination based on disability in violation of FEHA, failure to take corrective action in violation of FEHA, negligent promotion and supervision, retaliation in violation of FEHA, and violations of Business and Professions Code section 17200.

Defendants moved for summary judgment arguing, among other things, that the discrimination and harassment claimed by plaintiff were not based on national origin, but

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2 The second amended complaint named as defendants Chevron Corporation, Chevron North American Exploration and Production Company, and Chevron Australia Pty Ltd. Chevron Australia Pty Ltd. was subsequently dismissed. We refer to the remaining Chevron entities as Chevron.

on lack of citizenship, which is not a protected classification under FEHA. Additionally, they argued plaintiff admitted facts that negated elements of some causes of action and he had no evidence of discriminatory intent to overcome Chevron's showing that it had legitimate, nondiscriminatory business reasons for the adverse employment actions, including termination, taken against plaintiff. Plaintiff opposed the motion. The trial court granted the motion and entered judgment in favor of defendants. Plaintiff appeals.

DISCUSSION

I. Summary Judgment

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In moving for summary judgment, a "defendant … has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has met its initial burden, "the burden shifts to the plaintiff … to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid*.)

A grant of summary judgment is reviewed de novo. (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1113.) There is a triable issue of fact precluding summary judgment "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119–1120.) "The evidence of the party opposing the motion must be liberally construed, and that of the

moving party strictly construed." (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308.)

On appeal, the trial court's judgment is presumptively correct, and the appellant must affirmatively demonstrate error. (*Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 556–557 (*Yield Dynamics*).) "[A]n appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record." (*Id*. at p. 557.)

II. National Origin Discrimination and Harassment

FEHA prohibits an employer from refusing to hire, discharging, or discriminating against any person in terms, conditions, or privileges of employment based on specified classifications, including national origin and ancestry. (§ 12940, subd. (a).) It prohibits an employer or any other person, including a coemployee, from harassing an employee on the basis of the same classifications. (§ 12940, subd. (j)(1), (3).) Plaintiff's third cause of action alleged he was discriminated against in the terms and conditions of his employment on the basis of his national origin or association[3] in violation of FEHA. Plaintiff's fourth cause of action alleged he was harassed by Chevron, Diamond, and Fortnum based on his national origin or association.

"Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 (*Guz*).) In *Espinoza v. Farah Mfg. Co*. (1973) 414 U.S. 86 (*Espinoza*), the petitioner contended the

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3 We assume that, by "association," plaintiff is referring to FEHA's definition of the various protected characteristics as including not only actually having or being perceived as having the characteristic, but also "a perception … that the person is associated with a person who has, or is perceived to have, any of those characteristics." (§ 12926, subd. (*o*).) The second amended complaint did not allege facts showing plaintiff was discriminated against or harassed because he was associated with anyone of a particular national origin, nor did plaintiff present any facts or supporting evidence in an attempt to raise a triable issue of fact as to such a claim.

respondent discriminated against her based on national origin in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). (*Espinoza*, at p. 87.) The petitioner, a legal resident alien, had been denied employment by the respondent based on a company policy of hiring only United States citizens. The United States Supreme Court considered whether discrimination based on "'national origin'" included discrimination based on lack of citizenship. (*Id.* at pp. 87–88.)

The court stated: "The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." (*Espinoza*, *supra*, 414 U.S. at p. 88.) It noted that a proposed version of the statute had included both national origin and ancestry as protected characteristics, but ancestry was later deleted. "The deletion of the word 'ancestry' from the final version was not intended as a material change [citation], suggesting that the terms 'national origin' and 'ancestry' were considered synonymous." (*Id.* at p. 89.) Further, Congress itself had enacted statutes barring aliens from federal employment. (*Id.* at p. 90.) "To interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy." (*Ibid.*)

The court concluded: "Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." (*Espinoza*, *supra*, 414 U.S. at p. 92.) Further, "it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." (*Id.* at p. 95.)

Federal regulations define "national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or

his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." (29 C.F.R. § 1606.1.) "[T]he term is better understood by reference to certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation." (*Kanaji v. Children's Hospital* (E.D.Pa. 2003) 276 F.Supp.2d 399, 401–402.) "Further, courts have extended national origin protection to persons born in countries which no longer exist, [citation], and persons with non-sovereign ancestries (e.g. Acadians or 'Cajuns')." (*Dollman v. Mast Industries* (S.D.N.Y. 2010) 731 F.Supp.2d 328, 335.)

Plaintiff's third and fourth causes of action alleged defendants discriminated against plaintiff in the terms and conditions of his employment and harassed plaintiff "on the basis of his national origin" in violation of FEHA. Defendants' separate statement indicated these causes of action were premised on alleged discrimination and harassment based on plaintiff's expat status as a citizen of Australia. Defendants cited in support evidence that, by "expat status," plaintiff meant he was a non-U.S. citizen.

The evidence presented in support of and opposition to the motion for summary judgment included plaintiff's deposition testimony. Plaintiff testified Diamond treated expats differently than American engineers. His demeanor was different: friendly and helpful to Americans, but finding fault with small things the expats did. An expat engineer, Jose from Venezuela, complained to plaintiff on one occasion that Diamond had criticized his presentation for spelling and punctuation errors, without commenting on the core issues; Diamond also put Jose on a PIP. Plaintiff admitted he was unaware of Jose's performance ranking or any performance issues that led to the PIP. Another expat, Hugo, stated Diamond had suggested he take English classes, although both plaintiff and Hugo thought Hugo's English was acceptable. Hugo told plaintiff he thought Diamond did not like expats.

Plaintiff testified that, around the end of 2009, in a meeting with Diamond, Diamond stated that plaintiff was paid more as an expat, so he was expected to do more;

he could work in the evenings. Plaintiff believed the comment about working at night to finish his tasks was related to his expat status because he had not heard that being requested of other engineers, especially the American ones. Plaintiff also testified he believed he was being harassed through his heavy workload; the American engineers received help with their workloads, but he did not. Plaintiff believed his expat status was the only reason Diamond harassed him.

Plaintiff believed he was being harassed in that he was required to keep Diamond advised of his whereabouts at all times and was not allowed to attend certain meetings in person, but other engineers were allowed to post their locations on white boards and had no restrictions on attending meetings. He testified his poor performance review was related to the comment that he was an expat, he was paid more, and he was expected to work more.

Plaintiff did not allege or present evidence to support a claim of national origin discrimination or harassment. As defendants demonstrated in their motion, plaintiff asserted he was discriminated against and harassed because he was an "expat," i.e., not a United States citizen. Plaintiff did not assert he was disfavored because he was Australian. Nor did he contend he was discriminated against or harassed because he displayed the physical or linguistic characteristics of an Australian. He did not claim he was disadvantaged because he engaged in cultural activities or practices associated with being Australian. Rather, he claimed he was discriminated against and harassed on the basis of his lack of United States citizenship, which is not a protected classification under FEHA.

After plaintiff filed his opening brief, but before he filed his reply brief, an amended version of Civil Code section 51,[4] went into effect, which plaintiff argued in his

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[4] Included in the Unruh Civil Rights Act (Unruh Act).

reply and in supplemental briefing that this court should consider in construing the term "national origin."

Civil Code section 51 currently provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, *citizenship*, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b), italics added.) Thus, it prohibits discrimination in accommodations and services provided by businesses on the basis of a list of protected characteristics. The amendment, which was effective January 1, 2016, added "citizenship, primary language, or immigration status" to the list of characteristics protected under that act. (Stats 2015, ch. 282, § 1.) The statute that enacted the amendment provided that it did not constitute a change in, but was declaratory of, existing law. (Stats. 2015, ch. 282, § 2.) Plaintiff argues that, because the Legislature indicated citizenship was already a protected category under the Unruh Act because it was encompassed within national origin, we should construe FEHA as also encompassing citizenship within national origin. The legislative history of the amendment does not support that interpretation.

In its analysis of the bill that proposed the amendment, the Senate Judiciary Committee described FEHA with its list of protected categories and the Unruh Act with its protected categories. It noted the bill sought "to add citizenship, primary language, and immigration status as protected classifications under the Unruh Civil Rights Act." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 600 (2015–2016 Reg. Sess.) May 11, 2015.) The analysis further stated:

> "According to the author:
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> "The United States Supreme Court has previously held that citizenship and language are not the same as national origin, and that

> federal protections against discrimination on the basis of these characteristics is [*sic*] not covered by constitutional provisions and laws barring national origin discrimination. Thus, in *Espinoza*[, *supra*,] 414 U.S. 86, … the Court held that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of national origin, does not prohibit employment discrimination on the basis of citizenship." (*Ibid*.)

The analysis noted the author's statement that *Espinoza*, *supra*, 414 U.S. 86 had not been overruled and that it remained binding as a matter of federal law. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 600 (2015–2016 Reg. Sess.) May 11, 2015.)

The Assembly Judiciary Committee's analysis explained the perceived need for the amendment:

> "With respect to citizenship and language, proponents may be concerned that previous court cases may lead some California court to conclude in the future that these characteristics are too different from existing Unruh protected characteristics and therefore not protected from discrimination under the Unruh Act. In some analogous contexts, the U.S. Supreme Court has ruled that national origin and race are distinct from citizenship and primary language. For example, in *Espinoza*[, *supra*,] 414 U.S. 86, the Court held that while Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of national origin, it does not prohibit discrimination on the basis of citizenship. The Court commented that 'national origin' on its face refers to the country where a person was born or from which the person's ancestors came, and that the Congressional record only supported this interpretation. [Citation.] Consequently, the Court concluded that there was no reason to believe Congress intended for the term 'national origin' to have any broader scope. [Citation.] [¶] … [¶]
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> "Where there is a Supreme Court precedent establishing that citizenship and language are distinct from nationality and race, and that prohibiting discrimination based on the latter does not prohibit discrimination based on the former, the Unruh Act's prohibition of discrimination on the basis of nationality and race can arguabl[y] be said to not impliedly also prohibit discrimination on the basis of citizenship or language spoken." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 600 (2015–2016 Reg. Sess.) June 27, 2015.)

The analyses discussed both the Unruh Act and FEHA, and the existing categories being protected by those acts. Nonetheless, the only amendment enacted was an

amendment to the Unruh Act. No amendment to add "citizenship" to the FEHA categories was proposed or made. The ruling in *Espinoza* that national origin did not cover citizenship for purposes of federal employment law was recognized, and no change to FEHA was suggested. Accordingly, we conclude that, by amending the protected categories in the Unruh Act to expressly include citizenship, the Legislature did not manifest an intent that the listing of "national origin" in FEHA should be construed to protect against discrimination in employment on the basis of citizenship.

Consequently, like the trial court, we conclude plaintiff failed to raise a triable issue of material fact as to his third cause of action for discrimination based on national origin or his fourth cause of action for harassment based on national origin. Because the harassment cause of action was the only cause of action alleged against the individual defendants, defendants Diamond and Fortnum were entitled to judgment in their favor.

III. Disability Discrimination

FEHA prohibits an employer from refusing to hire, discharging, or discriminating against any person in terms, conditions, or privileges of employment based on physical disability or medical condition. (§ 12940, subd. (a).) The fifth cause of action of plaintiff's second amended complaint alleged discrimination based on disability. It alleged plaintiff was discriminated against based on a medical condition he suffered from in March 2011, which caused him to pass out at his workplace on April 20, 2011; he was hospitalized, then placed on leave of absence from April 20 to August 9, 2011. Plaintiff alleged Chevron failed to comply with its legal duty to "engage in a timely, good faith, interactive process with the employee … to determine effective reasonable accommodations." (§ 12940, subd. (n).) He alleged Chevron's disability discrimination culminated in "his retaliatory termination from his employment the day he returned to work from his medical leave of absence."

Under FEHA, it is an unlawful employment practice for an employer to discharge a person from employment or discriminate against the person in terms, conditions, or

privileges of employment based upon physical disability or medical condition. (§ 12940, subd. (a).) Prohibited discrimination may be proven by a showing of disparate treatment or disparate impact. "'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz, supra,* 24 Cal.4th at p. 354, fn. 20.) Here, plaintiff alleged a claim of disparate treatment discrimination.

At trial in a disparate treatment case, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz*, *supra*, 24 Cal.4th at p. 354.) The elements of a prima facie case of discrimination under FEHA are: "(1) [the plaintiff] was a member of a protected class, (2) [the plaintiff] was qualified for the position he sought or was performing competently in the position he held, (3) [the plaintiff] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id*. at p. 355.) If the plaintiff makes that showing, a presumption of discrimination arises. (*Ibid*.) The burden then shifts to the employer to rebut the presumption with evidence the adverse employment action was taken for a legitimate, nondiscriminatory reason. (*Id*. at pp. 355–356.) If the employer meets that burden, the presumption of discrimination disappears and the plaintiff may attack the employer's proffered reasons as pretexts for discrimination or offer other evidence of discriminatory motive. (*Id*. at p. 356.) The ultimate burden of proof of discrimination remains with the plaintiff. (*Ibid*.)

When a defendant moves for summary judgment on a discrimination claim, it may do so by challenging the plaintiff's ability to establish a prima facie case of discrimination. Alternatively, the defendant may assume a prima facie case may be made, and proceed directly to the second step by showing it had a legitimate business

reason, unrelated to prohibited bias, for the employment action. (*Guz, supra*, 24 Cal.4th at pp. 357, 358.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, fn. omitted.)

On the fifth cause of action, Chevron argued both that plaintiff could not establish a prima facie case of disability discrimination, because there was no evidence of motive to discriminate, and that plaintiff had no evidence to rebut Chevron's showing of a legitimate business reason for its employment actions. Chevron presented evidence that it accommodated plaintiff's medical needs. When plaintiff's doctor recommended he stop working completely after he passed out at his desk on April 20, 2011, Chevron complied with his doctor's instructions and placed him on medical leave. When plaintiff returned to work for a few days, but the doctor put him back on leave, Chevron again accommodated him. Additionally, prior to his medical leave, when plaintiff's doctor put him on medication that prevented him from driving, Chevron accommodated plaintiff by taking him off field work and having other engineers help with some of his work.

Chevron contended there was no evidence it had a motive to discriminate against plaintiff. When asked how he believed Chevron discriminated against him based on disability, plaintiff testified he believed, based on the termination letter, that he was terminated because he failed to complete his PIP, and he failed to complete his PIP because he was on medical leave. Chevron's evidence, however, indicated plaintiff failed to complete tasks that were to be completed before the date he went on medical leave, and plaintiff admitted the failure to meet those deadlines was not related to his disability or disability leave.

Chevron presented evidence that, prior to his medical leave, plaintiff failed to complete some assigned tasks in a timely manner. Plaintiff's supervisor, Hawker, met with her supervisor, Fortnum, in April and they decided to terminate plaintiff's

employment when he returned to work. Hawker summarized the tasks plaintiff had not completed, some of which were discovered after he went on leave; other employees were going to have to do plaintiff's work while plaintiff was on leave, and they could not find the necessary data. Plaintiff admitted he did not complete certain tasks on his PIP in a timely manner. Additionally, plaintiff admitted that, when he was placed on medical leave, he did not contact anyone at Chevron to advise them of assignments he had in progress to ensure they were transferred to someone else for completion.

Thus, Chevron articulated, and supported with evidence, legitimate business reasons, unrelated to the alleged discrimination, for the employment actions it took. The burden then shifted to plaintiff to present evidence that raised a rational inference that intentional discrimination occurred. (*Guz, supra*, 24 Cal.4th at p. 357.)

"[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005 (*Hersant*).) "'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. [Citations.] Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons."'" (*Id*. at p. 1005.)

Plaintiff did not meet this standard. Most of plaintiff's responses to Chevron's undisputed facts on this cause of action asserted legal conclusions (e.g., "Chevron

retaliated," "Fortnum continued the retaliatory [disciplinary] process") rather than facts. Plaintiff did not dispute that Chevron accommodated his disability by relieving him of field duties and placing him on medical leave in compliance with his doctor's instructions. Plaintiff attempted to show Chevron's legitimate reasons for terminating plaintiff's employment were untrue. He asserted he was told before he began his medical leave that he was meeting his PIP expectations. The supporting evidence referred to a PIP update from April 18, 2011, two days before the start of his medical leave.

Plaintiff did not, however, present evidence disputing Chevron's evidence that it discovered on or after April 19, 2011, that plaintiff had failed to meet deadlines prior to his leave. For example, there was evidence plaintiff was required to attend a driver training refresher class[5] by June 30, 2011, and had been advised at the beginning of his PIP (Feb. 22, 2011) to sign up early to ensure a spot in the class. He advised his supervisor on April 19, 2011, that he would not be able to complete the refresher course on time. A note on the PIP stated he did not attempt to register until April 19, 2011, and by then the only class prior to June 30, 2011, was full. Plaintiff testified he actually attempted to sign up a week or two prior to April 19, 2011, but the class was already full at that time. He contended that, if he had not gone on medical leave, he could have continued to check for vacancies in the class. He admitted he did not know if he could have fulfilled the requirement that way. He also admitted he informed his supervisor before his medical leave that the next available class was after the due date, and she indicated at that time that the expectation for the item was not met.

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5 In his separate statement responding to defendants' undisputed material facts, plaintiff asserted he was medically prevented from performing a driving test. He cited no evidence the driving class referred to in his PIP, which was not completed by June 2011, required any actual driving; he referred to it in his deposition as "the computer-based training requirements." Defendants asserted in reply and at oral argument that the requirement was for a classroom session; plaintiff had already completed the driving portion of the requirement.

The PIP also indicated Chevron learned on April 21, 2011, that plaintiff had failed to provide hydrotest calculations that had been requested on April 11 and again on April 18, which would have taken less than two hours to prepare. Plaintiff conceded he had agreed to review the calculations, but had not done so prior to his medical leave. Further, plaintiff was asked to provide big project budget items by April 22; he admitted he e-mailed his supervisor on April 20 to advise that he would not be able to meet the deadline "due to other priorities."

In his responsive separate statement, plaintiff did not cite any direct evidence of discriminatory animus, such as derogatory comments by any Chevron personnel about disabilities or disabled persons in general, or about plaintiff's disability or disability leave. Plaintiff did not show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" (*Hersant, supra*, 57 Cal.App.4th at p. 1005) in Chevron's proffered reasons for terminating plaintiff's employment. In fact, plaintiff admitted most of the performance deficiencies cited by Chevron.

Plaintiff attempted to show that Chevron itself did not consider the reasons given to be sufficient grounds for termination, but the testimony he cited did not support that conclusion. Referring to a list of uncompleted tasks, Fortnum was asked at deposition "were any of them on their own sufficient, in your opinion, to result in termination?" Fortnum responded: "Not on their own." He was not asked whether the items collectively, or any two or more in combination, justified termination. Chevron's evidence indicated it relied on multiple items, not on any one item alone, as the basis for terminating plaintiff's employment.

Plaintiff also seems to rely on the fact that his employment was terminated on the day he returned from his medical leave. "[T]emporal proximity, although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's

articulated reason was untrue and pretextual." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112 (*Loggins*).) Thus, temporal proximity may support a prima facie showing of discrimination, but, without more, it is insufficient to overcome the employer's showing of a legitimate, nondiscriminatory reason for its actions.

Additionally, the second amended complaint alleged plaintiff's medical condition began in March 2011. Plaintiff's PIP was dated February 22, 2011. Thus, the shortcomings in plaintiff's work, and Chevron's attempts to remedy them, began prior to plaintiff's alleged disability or medical condition.

Plaintiff offered no evidence raising a triable issue regarding whether Chevron harbored a discriminatory motive because of his disability or use of disability leave, or whether such a motive played a role in Chevron's decision to terminate his employment. Plaintiff failed to raise a triable issue of material fact on his claim of disability discrimination.

It is an unlawful employment practice "[f]or an employer … to fail to engage in a timely, good faith, interactive process with the employee … to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee … with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).) In addition to disability discrimination, plaintiff's fifth cause of action alleged Chevron failed to comply with this accommodation duty. Plaintiff has not identified or cited evidence of any accommodation he requested as a result of his disability that was denied, disregarded, or otherwise not addressed by Chevron.

We conclude the trial court correctly determined plaintiff failed to raise a triable issue of material fact regarding plaintiff's fifth cause of action for disability discrimination.

IV. Failure to Prevent Discrimination and Harassment

Under FEHA, it is an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (§ 12940, subd. (k).) Plaintiff's sixth cause of action alleged he complained numerous times about the unlawful discrimination, harassment, and retaliation he experienced but, in violation of FEHA, defendants did not take timely and reasonable steps to investigate, prevent, stop, or correct those occurrences.

A plaintiff cannot recover for failure to take steps to prevent discrimination or harassment unless actionable discrimination or harassment actually occurred. (*Dickson v. Burke Williams, Inc*. (2015) 234 Cal.App.4th 1307, 1314.) In *Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, the court found the jury's verdict was too inconsistent to be enforced, because the jury found in favor of defendants on the discrimination and harassment claims, but in favor of plaintiff on the claim that defendants failed to prevent discrimination and harassment. (*Id*. at pp. 283, 289.) The court stated: "The commonsense approach used by the trial court has great intuitive appeal: '[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen, for not having a policy to prevent discrimination when no discrimination occurred ….' Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented.… [¶] … The trial court correctly interpreted the verdict as not including an essential foundational predicate of harassment or discrimination, as required by the statutory scheme to support a finding of violation of" section 12940, subdivision (k). (*Trujillo v. North County Transit Dist*., *supra*, at p. 289.)

Because there was no triable issue of fact and Chevron was entitled to judgment on the discrimination and harassment causes of action, it was also entitled to judgment on this cause of action.

V. Retaliation

Under FEHA, it is an unlawful employment practice for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden [by FEHA], or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA]." (§ 12940, subd. (h).) Retaliating or discriminating against a person for requesting accommodation is also prohibited. (§ 12940, subd. (m)(2).) Further, it is an unlawful employment practice for an employer to discharge or discriminate against a person because of the person's exercise of the right to family care and medical leave. (§ 12945.2, subd. (*l*).)

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation '"'drops out of the picture,'"' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

Defendants' motion for summary judgment argued plaintiff could not show a causal link between his alleged protected activities and the adverse employment actions, and he could not rebut Chevron's showing of a legitimate reason for the adverse employment actions. Plaintiff asserts Chevron retaliated against him for the protected activities of taking family emergency leave, protesting discrimination and harassment, and needing accommodation and disability leave. He contends he presented sufficient evidence of a causal connection between these protected activities and the alleged adverse and retaliatory actions of Chevron. The evidence plaintiff cites was evidence that

Diamond and Fortnum were aware of plaintiff's complaints of perceived discrimination and harassment, and participated in making decisions about plaintiff's employment.

The second amended complaint alleged Diamond became plaintiff's supervisor in January 2010. Although most engineers kept track of their locations on white boards or by e-mails, by April and May 2010, Diamond demanded that plaintiff specifically notify him if plaintiff would be out of the office. Plaintiff complained to Fortnum of Diamond's harassment and prejudice against expats, but the discrimination and harassment continued and increased.

Plaintiff alleged that on July 19, 2010, he notified his supervisor he needed to return to Australia because his mother was seriously ill; he advised that he had a return flight on July 30, 2010. His return to Kern County was delayed because he had to obtain a renewal of his visa; he attributed the delay to incorrect information provided by Chevron. He returned to work on August 4, 2010, and Diamond said plaintiff had not notified him of the delay in his return and he had not known why plaintiff did not return to work on time. On August 12, 2010, Fortnum, with Diamond's input, placed a record of discussion, a disciplinary record, in plaintiff's employment record; it asserted false and trumped up accusations of noncompliance with Chevron policy. Plaintiff complained to Chevron's vice-president, Bruce Johnson, about the discrimination, harassment and retaliation.

The second amended complaint further alleged plaintiff's 2010 performance review indicated he fell short of expectations on incorrect grounds. In January 2011, plaintiff was assigned a new supervisor. On February 22, 2011, he was told he would be placed on a disciplinary PIP beginning March 14, 2011, through June 14, 2011. In follow-up meetings and reviews, he met expectations. On April 20, 2011, plaintiff experienced chest pains, collapsed at his desk, and was taken to the hospital. He was on medical leave until August 9, 2011. His employment was terminated upon his return, allegedly because he did not complete his PIP process.

In support of its motion for summary judgment, Chevron presented evidence that the August 12, 2010, record of discussion was placed in plaintiff's record because he failed to inform his supervisor of his whereabouts, and his unavailability contributed to a lack of work output. The record of discussion noted that plaintiff failed to notify his supervisor when working away from the office after numerous requests to do so; four dates of previous discussions were listed. It referred to a July 8, 2010, occurrence, when plaintiff failed to notify his supervisor that he would not be in the office, because he would be attending a meeting in Bakersfield, although he had received specific instruction from his supervisor to call in for the meeting. Diamond testified that, if plaintiff had been available more, he could have done more of the backburner tasks he was not completing. Diamond noted he had completed certain reporting tasks himself, although they were assigned to plaintiff, because there was a federal requirement and a deadline for making the report.

The record of discussion also stated that, when plaintiff went to visit his sick mother, he advised he would return the week of July 26, yet he "did not return to work until August 4 with no contact to supervisor." Plaintiff confirmed he was scheduled to return to work the week of July 26, 2010, but did not return until August 4, 2010. He blamed the delay on Chevron telling him he did not need an appointment to renew his visa, when he actually did;[6] he had to wait for the earliest available appointment, then wait for his passport to be returned with the visa. Plaintiff admitted that, although he thought he had updated Diamond on his change of plans on July 29, 2010, he sent the e-mail notifying Diamond of the delay to an incorrect e-mail address.

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6 Chevron also presented evidence that, before his trip, its attorneys advised plaintiff of potential delays in visa processing, provided a computer link to the appointment scheduling system for the United States consulate in Australia, and asked him "to confirm whether or not you've been able to obtain a visa appointment."

Chevron presented evidence that plaintiff's complaint to Fortnum about Diamond's conduct occurred after Diamond indicated plaintiff's 2010 performance review would reflect his performance problems. Nonetheless, Diamond initially recommended a 2 minus rating for plaintiff on his performance review. As Diamond explained the review process, the review was performed by all the supervisors and lead engineers, including Diamond, Fortnum, Hawker, and at least eight others; they ranked all the employees at plaintiff's pay grade, not just the engineers. One supervisor would volunteer to describe the work of an employee which the supervisor would rank as a 2 (meets performance expectations), and that employee would become the benchmark of a 2. The supervisors would give their own employees an initial ranking, then the group would compare the employee's accomplishments with the benchmark and the company's career ladder expectations to arrive at the final ranking. Although Diamond initially gave plaintiff a 2 minus rating, after discussion the group gave him a final rating of 3 (falls short of performance expectations). The 3 rating triggered a PIP.[7]

Hawker, not Diamond, administered the PIP, conducting biweekly meetings to review his progress toward meeting his PIP expectations. Hawker and Fortnum made the decision to terminate plaintiff's employment in the April time frame. Defendants also cited evidence Hawker, Fortnum, and the other supervisors who participated in plaintiff's 2010 performance review had no motivation to harass or retaliate against plaintiff because of his expat status, his complaint against Diamond, or his disability.

Plaintiff contends his evidence was sufficient to show a causal connection between his protected activities and the retaliatory actions of Chevron. He cites as retaliatory actions the record of discussion, the 2010 performance review, the PIP, and termination of his employment. Plaintiff asserts Diamond and Fortnum were aware of his protests and personally participated in the responsive decisionmaking.

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[7] A 2 minus rating would have made a PIP optional.

"For purposes of making a prima facie showing, the causal link element may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy his or her initial burden under the test by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision. [Citation.] [¶] Such evidence, however, only satisfies the plaintiff's initial burden." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388 (*McRae*).) Once the employer has presented a legitimate reason for the challenged action, the plaintiff must produce "substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual." (*Loggins, supra*, 151 Cal.App.4th at p. 1113.)

"At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics." (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816.) "Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive." (*Ibid*.) Comparative evidence is evidence that the plaintiff was treated differently from others who were similarly situated. (*Id*. at p. 817.)

Plaintiff cited no direct evidence of any retaliatory motive. He did not present any evidence that Diamond, Fortnum, Hawker, or any other employee of Chevron made disparaging remarks about plaintiff taking family emergency leave, protesting discrimination and harassment, or needing accommodation or disability leave. He presented no evidence the record of discussion was the result of plaintiff taking family leave, rather than because he failed to advise his supervisor of the delay in his return date. Further, in his opposition to the motion for summary judgment, plaintiff did not attempt to show the other supervisors, who participated in giving him the 3 rating on his 2010 performance review, were biased or retaliated against him based on any protected characteristic or activity. Rather, he asserted Diamond and Fortnum alone were the

decision makers who "downgraded [plaintiff] to a '3' rating triggering a retaliatory PIP and termination." Plaintiff cited no specific or substantial evidence to contradict defendants' showing that it was a group decision; he cited evidence that confirmed others participated in the discussion, then referred generally to every disputed fact in his separate statement and the supporting evidence.

Plaintiff's separate statement cited no facts or evidence to dispute that Hawker and Fortnum made the decision to terminate his employment, and they had no motivation to retaliate against plaintiff. Plaintiff's testimony that he thought Hawker was not fair to him and he had a feeling she "may have been influenced a little bit" was not substantial evidence of a motive to retaliate. A plaintiff's beliefs are not substantial evidence of a defendant's motivation. (*McRae*, *supra*, 142 Cal.App.4th at p. 398.)

Plaintiff also presented no comparative evidence of retaliation; he presented no evidence he was treated differently from others who were similarly situated but did not take family emergency leave, protest discrimination or harassment, or request accommodation or disability leave. He presented no statistical evidence.

Once the employer has presented a legitimate business reason for the actions it took, temporal proximity between the protected activity and the alleged retaliatory action alone is insufficient to raise a triable issue of fact regarding retaliation. (*McRae*, *supra*, 142 Cal.App.4th at pp. 388–389; *Loggins*, *supra*, 151 Cal.App.4th at p. 1112.) Plaintiff offered no additional evidence of unlawful motive. Accordingly, we conclude the trial court correctly determined plaintiff failed to raise a triable issue of material fact regarding the retaliation cause of action, and Chevron was entitled to judgment as a matter of law.

VI. Wrongful Termination in Violation of Public Policy

An employee may bring a tort action for wrongful discharge in violation of public policy when the "discharge contravenes the dictates of fundamental public policy. This cause of action 'is an exception to the general rule … that unless otherwise agreed by the parties, an employment is terminable at will.'" (*Sistare-Meyer v. Young Men's Christian*

Assn. (1997) 58 Cal.App.4th 10, 14.) "[A] policy may support a wrongful discharge claim only if it satisfies four requirements. The policy must be (1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) 'substantial' and 'fundamental.'" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 901–902.)

The first and second causes of action of the second amended complaint were for wrongful termination in violation of public policy. The first included a reference to FEHA in the caption, which the second did not include. Both alleged the California Constitution, FEHA, certain sections of the Labor Code, and certain sections of the Business and Professions Code prohibited discharging, discriminating against, harassing, or retaliating against any employee on the basis of national origin or disability, or because of complaints about unfair business practices, discrimination, harassment, retaliation, or request for accommodation. Both causes of action alleged plaintiff was a member of a protected class, because he was a resident expatriate employee and a disabled employee, and because he complained of wrongful conduct.

The first cause of action alleged plaintiff experienced discrimination, harassment and retaliation based on national origin and disability, he protested, and Chevron retaliated by terminating his employment. His national origin and disability were motivating factors in the decision to terminate his employment. The second cause of action alleged Chevron wrongfully terminated his employment. It also alleged Chevron failed to provide a workplace free of discrimination, harassment and retaliation, and failed to promptly investigate, remediate, or correct the discrimination, harassment and retaliation after plaintiff complained of it.

The allegations of the first and second causes of action essentially duplicate those of the third, fourth, fifth, sixth, and eighth causes of action, as to which plaintiff failed to raise a triable issue of material fact. In his opening brief, plaintiff attempts to show a

triable issue on the first and second causes of action by asserting the same facts he asserted in support of the third through sixth and eighth causes of action. He cites no legal authority or facts in the record to show that the wrongful termination causes of action do not fail for the same reasons the third, fourth, fifth, sixth, and eighth causes of action failed. He has not demonstrated that a triable issue of fact remains as to a wrongful termination cause of action based on the California Constitution or any of the statutes mentioned in the wrongful termination causes of action other than FEHA.

On appeal, the judgment is presumed correct and the burden is on the appellant to affirmatively demonstrate error. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.) "This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record." (*Yield Dynamics, supra,* 154 Cal.App.4th at p. 557.) Plaintiff has not demonstrated any error by the trial court in granting summary judgment on his wrongful termination causes of action.

VII. Negligent Promotion, Hiring and Supervision

Plaintiff presented no argument in his opening brief that there was error in the trial court's grant of summary judgment on the seventh cause of action for negligent promotion, hiring, and supervision of Diamond. Points raised for the first time in a reply brief will not be considered, in the absence of good cause for failing to raise them earlier. This is a matter of fairness, because raising them in the reply brief denies the respondent a fair opportunity to present opposing argument. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Plaintiff offers no explanation for the failure to address this cause of action in his opening brief; no good cause is shown. Accordingly, we will disregard arguments regarding this cause of action made for the first time in plaintiff's reply brief and conclude plaintiff has failed to establish any reversible error on this cause of action.

VIII. Unfair Business Practices

Plaintiff's ninth cause of action alleged that all of the previously alleged acts of discrimination, harassment, and retaliation constituted violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). The unfair competition law defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) It "'"borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163, 180.) In his opening brief, plaintiff asserts "discriminatory business practices which violate FEHA are 'unlawful' and give rise to an independent cause of action which provides additional remedies or penalties." He contends Chevron's business practices of unlawful discrimination, retaliation and wrongful termination support his ninth cause of action.

Plaintiff has failed to demonstrate that a triable issue of fact remains as to his FEHA causes of action. Thus, they cannot supply the unlawful business practices to support his unfair competition cause of action. Plaintiff has not suggested any other basis on which he could maintain this cause of action. Accordingly, he has not established any prejudicial error in the trial court's grant of summary judgment on this cause of action.

IX. Evidentiary Objections

In *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, the court declined to determine whether a de novo standard or an abuse of discretion standard applied to evidentiary rulings made in connection with motions for summary judgment. (*Id*. at p. 535.) Under either standard, we find no error in the trial court's evidentiary rulings.

"The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion."

(*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 761.) When exclusion of evidence is challenged on appeal, the appellant must show both that the exclusion was erroneous and that it resulted in a miscarriage of justice. (Evid. Code, § 354; *In re Automobile Cases I & II* (2016) 1 Cal.App.5th 127, 141–142.) The appellant "must demonstrate that, absent the error, '"a different result would have been probable."'" (*In re Automobile Cases I & II*, at p. 142.)

Plaintiff first challenges the trial court's sustaining of defendants' objection No. 2, to an excerpt from plaintiff's deposition in which plaintiff testified that he assumed Diamond received the e-mail plaintiff sent concerning the delay in his return from his trip to Australia. Defendants objected that the testimony was speculative and incomplete, because it did not include other testimony of plaintiff in which he acknowledged Diamond told plaintiff he had not received the e-mail and plaintiff had no reason to believe that was untrue. Plaintiff argues the challenged testimony was testimony as to plaintiff's state of mind. He does not identify any issue to which his state of mind on this subject would be relevant. Even if it was error to exclude the evidence, however, it is not probable the outcome would have been different if it had been admitted, because it was undisputed that plaintiff sent the e-mail to an e-mail address Diamond did not use, and Diamond did not receive it until plaintiff returned to work after his trip. No prejudicial error has been shown.

Plaintiff challenges the sustaining of defendants' objections Nos. 3 and 7. Objection No. 3 was directed at deposition testimony of plaintiff that he "felt that [Diamond] was out to make me fired." Objection No. 7 was directed at plaintiff's deposition testimony that the areas in which he was not meeting his PIP expectations were because of his medical leave. Defendants objected that both items constituted speculation and opinion without foundation.

A plaintiff's opinion "has no probative value absent a showing that the opinion is based on fact." (*McRae, supra*, 142 Cal.App.4th at p. 394.) A plaintiff's "beliefs are not

substantial evidence of defendants' motivation." (*Id*. at p. 398.) Plaintiff cites no legal authority for the admissibility of a witness's opinion evidence, without a factual basis, concerning the motivations of another. He has not pointed us to any factual basis for plaintiff's opinions. He has not established any error in the trial court's ruling.

In objections Nos. 9 and 10, defendants objected to all but the first two pages of exhibit J and all but the first page of exhibit Q, on the ground plaintiff failed to authenticate those additional pages. Plaintiff's argument that this evidence should not have been excluded is incomprehensible. Defendants' objections noted the pages to which they objected were not cited or relied on in plaintiff's opposition to the motion for summary judgment. If plaintiff did not cite or rely on them in his opposition, it is difficult to imagine how their exclusion could have been prejudicial to the outcome of the motion. No prejudicial error in the trial court's ruling has been demonstrated.

Plaintiff also challenged the ruling on defendants' objection No. 11. Defendants objected to handwritten notes on the face of exhibit Q on the ground they were hearsay. Plaintiff cites no California legal authority that would overcome defendants' hearsay objection. The federal authority cited is contrary to California law. (Compare *Fonseca v. Sysco Food Services of Arizona, Inc*. (9th Cir. 2004) 374 F.3d 840, 846 ["Even the declarations that do contain hearsay are admissible for summary judgment purposes because they 'could be presented in an admissible form at trial'"] with *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855 [documents obtained in discovery and used to support or oppose a motion for summary judgment must be authenticated, admissible, and nonhearsay] and *Dollinger DeAnza Associates v. Chicago Title Ins. Co*. (2011) 199 Cal.App.4th 1132, 1144–1145 ["a party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact'"].)

Finally, plaintiff challenges the sustaining of defendants' objections Nos. 12 through 15. Defendants objected to exhibits V, X, Y and CC, on the ground each was

only cited by plaintiff as supporting a dispute as to defendants' undisputed material fact No. 2, but each exhibit was irrelevant to the claimed dispute. Plaintiff's argument regarding these exhibits does not explain how the excluded evidence supported the claimed dispute of defendants' undisputed material fact No. 2. Plaintiff has not established any prejudicial error in the exclusion of this evidence.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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HILL, P.J.

WE CONCUR:

_____
GOMES, J.

_____
SMITH, J.